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9 UNITED STATES BANKRUPTCY COURT

10 DISTRICT OF NEVADA

11 In Re:

Case No.: BK-N-05-54727-GWZ
Chapter 7

12 SCOTT K. GREENE,

**REPLY IN SUPPORT OF
OBJECTION TO DEBTOR'S
AMENDMENTS TO SCHEDULES**

13 Debtor.

Hearing Date: November 10, 2010
Hearing Time: 10:00 a.m.
Time Requested: 10 minutes

14 _____ /
15 Annabelle Savage, duly appointed Chapter 13 Trustee ("Trustee") by and through her
16 attorney, William D. Cope, Esq., hereby files her reply in support of objection to the amendments
17 to Schedule A, Schedule C, and Summary of Schedules filed herein by Debtor, Scott Greene,
18 ("Debtor").

POINTS AND AUTHORITIES

19 **I. GREENE'S AMENDMENTS HAVE PREJUDICED THE TRUSTEE AND HER
20 COUNSEL**

21 Greene acknowledges that under the controlling authority of In re Arnold, 252 B.R. 778 (9th
22 Cir. BAP 2000), an amendment must be conditioned on the payment of all administrative expenses
23 incurred as a result of the Trustee's reliance on the Debtor's original schedules. However, Greene
24 contends that the Trustee and her counsel suffered no prejudice as a result of any reliance on the
25 original schedules, except for the prejudice resulting from the litigation of the post-petition
26 appreciation issue. Greene further contends that regardless of the value of the property claimed in
27 his original schedules, the Trustee would have incurred expenses to litigate the issue of the
28 exemption cap under 11U.S.C. § 522(p), and therefore that expenses incurred in connection with

1 that issue were not the consequence of Greene's delay in amending his schedules. Thus, Greene
2 apparently concedes that the Trustee has been prejudiced at least to the extent that her claimed
3 expenses relate to the post-petition appreciation issue, but disavows any responsibility for
4 additional litigation expenses. However, Greene's Reply completely ignores the Trustee's
5 argument as to why she and her counsel have been prejudiced as a result of Greene's belated filing
6 of his amendments.

7 As the Trustee explained in her Objection to Debtor's Amendments to Schedules, until
8 Greene amended his schedules, the Trustee had every right to rely on the original schedules for all
9 purposes. As noted in the Trustee's objection, based upon the \$240,000 valuation stated in
10 Greene's original Schedule C, the value of the post-petition appreciation was \$130,000. And as
11 the Trustee explained, if the post-petition appreciation was \$130,000, the most that Greene would
12 ever have been entitled to, even if his claim were not subject to the \$125,000 cap under § 522(p),
13 would have been \$162,000 (the value of the property on the date of the petition less the \$78,000
14 mortgage). Since Greene received a payment of \$125,000 at the time of the sale, the most that he
15 would have been entitled to if he had not amended his schedules would have been \$37,000. Greene
16 has not disputed any of these facts, all of which are set forth in the Trustee's Objection.

17 It follows that prior to Greene's amendment of Schedule C (on April 19, 2010), all of the
18 expenses that the Trustee had incurred (some of which are the subject of the Trustee's counsel's
19 pending fee application) would have been payable from non-exempt property held by the Trustee.
20 And if Greene had not amended his Schedule C, the Trustee would have retained approximately
21 \$65,000 after paying Greene the \$37,000 remaining due on his homestead exemption. Thus, had
22 Greene not amended Schedule C, the Trustee would have had approximately \$65,000 in funds in
23 the estate with which to pay the remaining administrative expenses, and to distribute to creditors.
24 Accordingly, at all times when the administrative expenses were being incurred, the estate had
25 sufficient non-exempt funds to pay such expenses in full. Under such circumstances, there can be
26 no question that all of the litigation expenses were incurred by the Trustee in reliance on the fact
27 that the estate had sufficient non-exempt property (consisting of the value of the post-petition
28 appreciation) to cover such the expenses, and that such property would remain non-exempt

1 regardless of the outcome of the homestead litigation.

2 Although Greene's Reply advances no argument countering any of the foregoing points,
3 it should be noted that there is no legal basis for concluding that the amended schedules have some
4 sort of retroactive effect. To the contrary, as the court observed in In re Harris, 101 B.R. 210, 213
5 (Bky. E.D. Cal. 1989)(relied upon approvingly by the Ninth Circuit BAP in Arnold), it is not the
6 trustee's burden to speculate as to what the debtor might claim in the future. As Harris explained,
7 there is a "very practical problem facing trustees when debtors have either failed to claim assets
8 as exempt or have made improper exemption claims.... Thus when he has taken appropriate action
9 but is ultimately thwarted due to the debtor's overriding rights, debtor, having caused the trustee
10 to act because of the debtor's initial negligence, should be required to reasonably compensate the
11 trustee and reimburse him for his reasonable fees and expenses." Until Greene amended his
12 Schedule C, the Trustee was required to treat the value of the sale proceeds represented by the post-
13 petition appreciation as property of the estate, and to administer the estate in all respects in
14 accordance with such classification.

15 II. GREENE'S DELAY IN AMENDING HIS SCHEDULES IS INEXPLICABLE

16 It should further be noted that Greene has no excuse for waiting more than four and one-half
17 years to amend his schedules. Indeed, as early as the November 21, 2006, hearing on the Trustee's
18 Motion to Sell Free and Clear of Lien, Greene contended that the property was worth more than
19 \$240,000 on the date he filed his petition. See, Transcript of Hearing on Motion to Sell Free and
20 Clear of Lien, excerpts of which are attached hereto as **Exhibit "1"**, pp. 42-44. In view of such
21 argument, Greene certainly should have amended Schedule C prior to the hearing if he believed
22 he had grounds for doing so. But instead, Greene waited another three and one-half years before
23 filing his amendment. During that whole period of time, the value of the sale proceeds represented
24 by the post-petition appreciation (\$130,000) remained property of the estate.

25 In his response to the Trustee's objection, Greene contends that "amending his Schedule
26 C prior to the October 2, 2009, decision of the Ninth Circuit would have been largely a useless act.
27 Debtor would have been out of pocket for the cost of an appraisal, yet would not have been entitled
28 to an additional penny." However, Greene's assertion is incorrect for several reasons. First,

1 Greene did not need to obtain an appraisal to amend his schedules. As is shown by Greene's
2 counsel's arguments at the 2006 hearing, he believed that the \$370,000 sales price reflected the
3 value of the property as of the petition date. See, Exhibit "1", p. 42:15.

4 Second, amending Schedule C would not have been a useless act because it was the only
5 means by which Greene could put the Trustee on notice that he was claiming that there was no
6 post-petition appreciation, and hence that there might be an issue as to whether the funds that the
7 Trustee was relying on to pay ongoing administrative expenses might actually be part of the
8 Debtor's homestead exemption. Had such an amendment been filed at an earlier date, the Trustee
9 would have had an opportunity to determine whether to cease appellate litigation over the § 522(p)
10 issue relating to the homestead cap because, in the event that Greene were to prevail as to that
11 issue, the value of the post-petition appreciation might no longer be available to pay future
12 administrative expenses. But the Trustee obviously had no reason to consider such matters because
13 Greene did not amend Schedule C until April of 2010.

14 Greene also asserts that he did not previously amend Schedule C because his claims for an
15 exemption in the amount of \$240,000 "was sufficient to guarantee Debtor his full homestead as
16 determined by this Court and, on appeal, by the district court (sic)." See, Greene's Response, p.
17 5:9. However, Greene's assertion is both legally irrelevant and factually incorrect. Greene's
18 assertion is legally irrelevant because regardless of the amount of his original claim of exemption,
19 the post-petition appreciation belonged to the estate until the date of the amendment, and thus was
20 available to pay expenses of the estate incurred in reliance on the original schedules.

21 Greene's assertion that his original claim of exemption was \$240,000 is also factually
22 incorrect because, under Nevada law, he was only permitted to claim an exemption in the equity
23 in his property. NRS 115.010(2). Since Greene claimed that the value of the property was
24 \$240,000 as of the date of his petition, and since he acknowledged in his original schedules that
25 the property was subject to a mortgage in the amount of \$78,000, Greene's original claim of
26 exemption can only be interpreted to have been a claim for the amount of his equity in the property
27 at the time when he filed his petition (\$162,000). Thus, Greene's attempt to now suggest that he
28 claimed an exemption in an amount greater than his equity in the property is belied by his own

1 original declarations with respect to the value of his claimed exemption.

2 Parenthetically, it is interesting to note that in his Response, Greene asserts that although
3 he amended Schedule C to state a new value for the property (\$370,000 versus \$240,000), he did
4 not amend his claim of exemption, which continues to be the same amount that he originally
5 claimed. Response, p. 6:8. But if Greene did not intend to amend the amount of his claim of
6 exemption, the amount of the claim remains \$162,000, because that was all that he claimed on his
7 original Schedule C. See Schwab v. Reilly, 130 S. Ct. 2652 (2010)(the fact that the debtor has
8 equated the value of the claimed exemption with the estimated market value does not allow the
9 debtor to exempt more than the amount of the claim, even if the value of the property ultimately
10 proves to have been greater than estimated). Under such circumstances, it is clear that in order to
11 increase the amount of his claim of exemption, Greene would have been required to amend his
12 claim, and to affirmatively state that he is now seeking an exemption in an amount greater than the
13 equity in the property that was represented in his original schedules.

14 **III. THE FACTS AVERRED IN THE DECLARATION OF DAVID RANKINE ARE**
15 **COMPLETELY IRRELEVANT**

16 Green also attempts to rely on the declaration of David Rankine, which, according to
17 Greene, shows that “the Trustee, prior to any fee awards in this case, assured Mr. Rankine, then
18 Debtor’s co-counsel on the appeals, that he would not seek his fees or expenses from money that
19 might be given to Mr. Greene.” Therefore, according to Greene, “the Rankine declaration estopped
20 the trustee from now deducting administrative expenses from Debtor’s homestead.” See, Greene’s
21 Response, p. 6:24-27. However, Green’s reliance on the Rankine declaration only highlights
22 Greene’s mis-analysis of the issue.

23 Preliminarily, it should be noted that Greene has mischaracterized the Rankine declaration
24 in a significant respect. Greene’s argument omits references to two crucial sentences from the
25 declaration. The declaration states that “I expressed my concern that fees not be paid from monies
26 that might prove to be exempt. Mr. Cope responded that the estate had adequate resources to pay
27 its counsel from sources other than the claimed homestead.” Thus, Mr. Cope’s statement plainly
28 had reference only to funds that might ultimately be reclassified as exempt as a result of Greene’s

1 appeal of the homestead issue, not as a result of some possible future amendment of Greene's
2 schedules.

3 Moreover, Mr. Cope's statement that the estate had adequate resources to pay its counsel
4 from sources other than the claimed homestead was absolutely correct. As discussed above,
5 Greene's claim that his homestead should not be limited by the \$125,000 cap in no way affected
6 the characterization of the post-petition appreciation as property of the estate. Regardless of
7 whether Greene won his appeal regarding the cap, the exemption would not include the post-
8 petition appreciation.¹ Thus, it is indisputable that at the time when Mr. Cope represented that
9 funds were available to pay fees from sources other than those that might, as a result of the appeals,
10 become included within Greene's homestead, that representation was entirely true because, as this
11 court ruled, and as the Ninth Circuit affirmed on appeal, the funds consisting of the post-petition
12 appreciation were not part of the claimed homestead.

13 In view of the above, it is readily apparent that Greene has gone to considerable lengths to
14 try to mask the pivotal fact that until his amendment, the post-petition appreciation was not covered
15 by his homestead claim. Indeed, every part of Greene's argument ignores the status of the
16 bankruptcy estate as of the date when the Ninth Circuit issued its decision. As of that date, Greene
17 had prevailed in reversing the imposition of the Section 522(p) cap. But Greene failed to obtain
18 a reversal of any aspect of this Court's ruling that all of the appreciation occurred post-petition, and
19 therefore that the value of such appreciation was not included within the homestead exemption
20 (even without the cap). Thus, as of the date of the Ninth Circuit's decision, the post-petition
21 appreciation remained property of the estate, and Greene had failed to file anything to indicate that
22 he had legal grounds for reclassifying the post-petition appreciation as pre-petition appreciation.
23 Accordingly, Greene's argument is nothing but a misleading attempt to rewrite the history of this
24 case.

25 Further, the expenses incurred by the Trustee resulted in a significant benefit to the estate.
26 As a result of the Ninth Circuit's affirmance of this court's ruling with respect to the post-petition

27 ¹ Greene argued on appeal that the post-petition appreciation did not belong to the estate, but the Ninth Circuit
28 ruled against him on that specific issue.

1 appreciation issue, the estate was able to retain approximately \$65,000 in funds at the end of the
2 Ninth Circuit appeal, a portion of which could have been distributed to creditors if Greene had not
3 amended his schedules. The Trustee did exactly what she should have done, and nothing more than
4 what was required under the circumstances.

5 **IV. BANKRUPTCY RULE 4003 DOES NOT APPLY TO THE TRUSTEE'S**
6 **OBJECTION**

7 Lastly, Greene contends that the Trustee's objection is untimely under Rule 4003(b)(1).
8 However, Greene's argument here is wrong because Rule 4003(b)(1) does not apply to the
9 Trustee's objection to Greene's amendment. Rather, Rule 4003(b) is applicable, by its terms, only
10 to objections to "the list of property claimed as exempt." The recent Supreme Court case of
11 Schwab v. Reilly, 130 S.Ct. 2652 (2010) (cited by Greene in support of the mundane proposition
12 that objections required under Rule 4003 must be timely made), plainly holds that Rule 4003(b)
13 only applies to objections based upon (1) the fact that the property listed on schedule C is not
14 exempt, or (2) the fact that the amount of the exemption listed in the column titled "Value of
15 Claimed Exemption" exceeds the statutory limits. Id. at 2663.

16 In the present case, the Trustee has determined that it would not be feasible to pursue a
17 challenge to Greene's amended valuation. Nor is the Trustee objecting on the ground that the
18 amount of Greene's claim exceeds the statutory limits of the homestead exemption. The Trustee
19 is only objecting to Greene's attempt to use the amendment to prevent the Trustee from paying
20 administrative fees, and that objection has nothing to do with the information set forth in Schedule
21 C of the Debtor's amendments. Accordingly, although Greene has ostensibly relied upon Schwab
22 in support of his argument herein, the holding of that case apparently escaped his notice.

23 **V. CONCLUSION**

24 For all of the foregoing reasons, it is respectfully submitted that Greene should be required
25 to pay all remaining administrative expenses.

26 DATED this 26th day of October, 2010.

WILLIAM D. COPE, LLP

27 By: 
28 William D. Cope, Esq.

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LIST OF EXHIBITS

Exhibit

No. of Pages

Exhibit "1." Excerpts of Transcript of Hearing on Motion to Sell Free
and Clear of Lien

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EXHIBIT "1"

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In Re:	.	Docket No. BK-N 05-54727-GWZ
SCOTT K. GREENE,	.	Reno, Nevada
	.	November 21, 2006
Debtor.	.	10:27:21 a.m.
.	.	

HEARING
ON MOTION TO SELL FREE AND CLEAR OF LIEN;
PAYMENT OF SALES COMMISSION
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GREGG W. ZIVE
UNITED STATES BANKRUPTCY JUDGE

Electronic Court Recorder: Sylvia Tilton

Transcription: Typewrite Services Inc.
P.O. Box 5804
Sparks, Nevada 89432-5804

Proceedings recorded by digital sound recording, transcript
produced by transcription service.

1 The commission is reasonable. It can be split
2 among the realtors any way they see fit;

3 (Pause in proceedings)

4 THE COURT: And I'm fully cog -- I assume that the
5 findings I made are probably dicta because they are
6 probably unnecessary just to rule in favor of the trustee's
7 motion to sell;

8 But since the issues were before me, I might as
9 well do it while we were here is how I look at it, Mr.
10 White.

11 MR. WHITE: Well, your Honor, I -- if the Court's
12 ruling is turning on the fact that the schedules of the
13 debtor at the time, --

14 THE COURT: Might not --

15 MR. WHITE: --- we have evidence here now today
16 with the sales price that the property --

17 THE COURT: My point is is that even the case you
18 rely upon, which is Rasmussen, only dealt with the pre-
19 petition appreciation in the value of the property.

20 And it was dicta.

21 I'm just making further distinctions.

22 What I am saying is that the homestead in this
23 case is a hundred and twenty-five thousand dollars;

24 That the post-petition appreciation of the value
25 of the property belongs to the estate;

1 That the sale has not been challenged;

2 It appears to be a proper exercise of the
3 trustee's business judgment;

4 And that the debtor is entitled to his homestead
5 exemption of a hundred and twenty-five thousand dollars;

6 And that's based upon my earlier ruling in July
7 and September, which remains unstayed and is clearly the
8 law of this case.

9 You've asked me, in a sense, to reconsider those
10 today, Mr. White. I --

11 MR. WHITE: Your Honor, no.

12 THE COURT: I've looked at the new case law you --
13 submitted;

14 I thought about it;

15 MR. WHITE: Okay.

16 THE COURT: And I'm not reconsidering that.

17 MR. WHITE: All right.

18 What I would ask though is that since an earlier
19 order of this Court has directed the trustee to hold all of
20 the proceeds pending the outcome of the appeal in any
21 event, --

22 THE COURT: Fair enough.

23 MR. WHITE: -- that we have -- that your Honor
24 make a proviso or condition in the order that you're just
25 entering that the debtor has an opportunity to present

1 evidence of the value of the property on the petition date,
2 if that is part of your Honor's reasoning.

3 THE COURT: No. It's not -- my reasoning is the
4 exemption is determined on the date of the filing of the
5 petition.

6 The post-petition appreciation belongs to the
7 estate.

8 The valuation -- then I made a further
9 distinction. I looked at the facts and looked at the
10 schedules, looked at the evidence I had before me;

11 And there wasn't an attempt to reopen it or to go
12 back to that;

13 Frankly --

14 MR. WHITE: Well, I would just like --

15 THE COURT: The pre-petition increase, if there
16 had been any, in the value of the thing maybe. But I don't
17 have that;

18 It's determined the date of the filing;

19 It's two hundred and forty thousand dollars. And
20 that's what we're dealing with.

21 And the exemption itself. Remember it's a value
22 of the homestead. And the value of the homestead is a
23 hundred and twenty-five thousand dollars.

24 And it doesn't matter what the value of the
25 property is because it's never going to be more than a